OFFICE OF THE CLERK
FILED
MAR 3 0 2005
OFFICE OF THE CLERK

(3)

No. 04-1132

In the Supreme Court of the United States

LIMAGRAIN GENETICS CORPORATION,
Petitioner,

v.

MIDWEST OILSEEDS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

OF COUNSEL:

JOHN F. FATINO
WHITFIELD & EDDY, PLC
317 SIXTH AVENUE, SUITE 1200
DES MOINES, IA 50309
(515) 288-6041

MICHAEL ROSIELLO
BARNES & THORNBURG
11 S. MERIDIAN STREET
SUITE 1313
INDIANAPOLIS, IN 46204
(317) 231-7353

GEORGE PAZUNIAK
Counsel of Record

FRANCIS DIGOVANNI
CONNOLLY BOVE LODGE
& HUTZ LLP
1007 N. ORANGE STREET
SUITE 878
WILMINGTON, DE 19801
(302) 658-9141

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

I. Respondent Confirms That Review is Important . 1

II. Respondent's Erroneous Description of Facts . . 2

III. Respondent's Arguments Only Reaffirm The Need for Review And Constitutional Error Below . . . 4

A. Facts Underlying Questions of Law Must Go to the Jury 4

B. Policy Considerations Do Not Trump the Seventh Amendment 5

C. Petitioner Did Not Invite Error, and Has Argued Consistently Below and in the Petition 7

D. Petitioner Preserved Error 8

E. This Case Meets the Standards for Certiorari 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.,
356 U.S. 525, 537-40 (1958) 4, 5, 8

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 8

Erie R.R. v. Tompkins,
304 U.S. 64 (1938) 1, 4

United States v. Booker,
__ U.S. __, 125 S. Ct. 738,
160 L. Ed. 2d 621 (2004) 5, 6

Other Authorities

Fed. R. Civ. P. Rule 56 . . . . . 2, 3, 6, 7, 8

REPLY TO BRIEF IN OPPOSITION

I. Respondent Confirms That Review is Important

Respondent attempts to misdirect the Court from the core elements of the Circuit Court's decision by posturing the decision below as a pedestrian application of law to fact. But Respondent's efforts only admit the Constitutional issue and confirm the need for review:

First, Respondent admits that Petitioner Limagrain relied on "fact-based and state-law arguments" below. (Opp. 1). This was a state-law fact-based case, until the Circuit Court erroneously denied Petitioner's Seventh Amendment Constitutional right to a jury trial of those fact-based issues. Similarly, Respondent correctly accuses Petitioner of being dissatisfied with the "factual finding" of the courts below. (Opp. 17). However, the problem is not whether the courts below decided the facts correctly, but that they decided the facts at all. The Seventh Amendment requires those common law disputed fact issues to be determined by the jury. It was Constitutional error for the Circuit Court to misread *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) to require federal courts to deny a jury trial.

Second, Respondent justifies the Circuit Court decision on the ground that any facts underlying an "issue of law" are adjudicated by the judge and not a jury. That is incorrect and directly contradicts a host of precedent of this Court that Respondent's proposition would violate the Seventh Amendment. There is nothing inconsistent with Petitioner Limagrain recognizing below, as it does here, that (a) reasonableness of liquidated damages is a question of law; but (b) any factual disputes have to be resolved by a jury.

II. Respondent's Erroneous Description of Facts

Respondent's factual arguments rewrite history and, in any event, are immaterial. They should not obscure the critical issues deserving review, which remain even if Respondent's asserted facts were accepted.

1. Respondent misleadingly portrays Petitioner's summary judgment motion to justify a "reverse" judgment. However, contrary to Respondent's proposition, Petitioner never argued that all the facts relating to the liquidated damages clause were undisputed. Petitioner moved for summary judgment, as permitted by Fed. R. Civ. P. Rule 56, because it believed that certain cited undisputed facts established that the liquidated damage clause was unreasonable as matter of law. A motion for summary judgment does not suggest that there are no other facts, particularly evidence that is disputed, which, if accepted by a jury, would prevent the enforcement of the liquidated damages clause. Respondent's assertions distort the nature of the Rule 56 procedure.

In any event, Respondent never moved for summary judgment, and the lower court never gave notice of any intent to issue summary judgment. Rule 56 does not authorize summary judgment for the non-moving party, absent a cross-motion or proper notice by the court.

2. Respondent argues that Petitioner Limagrain had the opportunity to present all facts relevant to summary judgment of the reasonableness of the damage clause. (Opp. 4). That is wrong and misdirects the inquiry:

a. The Circuit Court did *not* determine that there were no disputed material facts, but adjudicated facts upon a

disputed record. (Pet. 9-10). The issue is whether the Circuit Court violated the Seventh Amendment by itself deciding those disputed fact issues on appeal, even if Petitioner had the opportunity to present all favorable evidence into the record.

b. Respondent errs on the facts. Not all evidence may be presented in a Fed. R. Civ. P. Rule 56 motion, but only those that are undisputed. Petitioner moved for summary judgment based on certain facts, selected because they were undisputed as required by Rule 56. In the absence of a proper cross motion by Respondent, or proper notice of the district court, Petitioner Limagrain never had an opportunity to present all evidence, including disputed evidence relevant to the determination whether the clause was so unreasonable as to be unenforceable.

3. Contrary to Respondent's argument (Opp. 4), Petitioner moved for reconsideration in the lower court, but the lower court maintained its position based on the single undisputed -- but on the issue of reasonableness, irrelevant – fact that Petitioner had signed the agreement.

4. Respondent alleges facts that purportedly support the finding of reasonableness. (Opp. 5-6). Those facts are not true, and Petitioner never had a full and fair opportunity to respond to them, because Respondent never presented them in any motion to which Petitioner could respond. Moreover, even if those facts were true, which they are not, they are merely factors that a jury should have considered together with Petitioner's evidence that support a finding that the clause was unreasonable. (Pet. 15-17 n. 8)

III. Respondent's Arguments Only Reaffirm The Need for Review And Constitutional Error Below

A. Facts Underlying Questions of Law Must Go to the Jury

Respondent's legal argument essentially reduces to a single Constitutional question. That question is whether the Circuit Court correctly cited and construed *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) to mandate that, in a federal court, the judge, not a jury, should resolve all factual disputes involving any matter that state law deems to be "an issue of law." Respondent admits that the Circuit Court engaged in fact-finding, but asserts that it had the right to do so. If the federal courts are prohibited from adjudicating facts in a state-based common-law action, even with regard to matters deemed "issues of law" by the state, then Respondent has no response and essentially agrees that the Circuit Court's decision violated Petitioner's right to a jury trial.

Despite the critical nature of this issue, Respondent does not even attempt to distinguish *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 537-40 (1958), which directly held that the Seventh Amendment requires a jury to determine facts even when governing state statute provided that the question was of law and specifically required adjudication by a court and not a jury. (*Byrd, supra*, 356 U.S. at 537). Underscoring its inability to distinguish *Byrd,* Respondent mentions it only once, without any discussion. (Opp. 12). Thereafter, Respondent merely attempts to avoid the issue. The Circuit Court's application of *Erie v. Tompkins* plainly contradicts *Byrd*, and Respondent does not even attempt to rationalize the lower court decision with *Byrd*, because it can not.

B. Policy Considerations Do Not Trump the Seventh Amendment

Unable to address *Byrd* and its progeny, Respondent suggests that the federal courts have established a "policy" exception to the Seventh Amendment. Respondent argues that it is "nonsense of the highest order" to submit enforceability of liquidated damages to a jury. (Opp. 12). It argues that this defeats the "policy" of liquidated damage clauses, which are designed to establish damages without trial. Respondent supports this view with citations to several lower court cases that have said that enforceability of liquidated damage clauses is one "of law." (Opp. 12-13).

Respondent's argument only accentuates the need for review. There is no "policy" exception to the Seventh Amendment, and none has ever been recognized by this Court. If the matter is one that was triable to a jury at common law, the Seventh Amendment requires that it be tried to the jury, regardless of any judicial or legislative preferences or views as to what would be better practice.

In *United States v. Booker*, __ U.S. __, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2004), this Court held that Congressional "policy" determinations for streamlining and imposing appropriate sentences could not survive the right to a jury trial provided by the Sixth Amendment. The Court held:

> But the interest in fairness and reliability protected by the right to a jury trial -- a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment -- has always outweighed the interest in concluding trials swiftly.

(*Booker, supra*, 125 S.Ct. at 756). The same consideration applies here under the Seventh Amendment. However convenient it may be to have the judges adjudicate facts in order to promote the use of liquidated damage clauses, that can not justify a denial of the protection of the Seventh Amendment.

Respondent's argument that the federal courts have made such policy judgments only reinforces the need for review. (Opp. 12-13). Such views do not reflect the Seventh Amendment or Rule 56. To the contrary, they are destructive of the Founders' decision to entrust common-law damage issues to a jury. Nothing can more quickly or surely undo the fabric and principles of the United States Constitution than the notion that judges can unilaterally decide what parts of the Constitution they will follow and which they will discard on "policy" or similar grounds. Respondent's argument only highlights why this Court should review the decision below and determine whether the Constitution permits federal courts to make "policy" choices as to when the Seventh Amendment applies and when citizens should be denied their right to a jury trial in a common law case.

Thus, the Court should examine how the "policy exception," advanced by Respondent as the basis of the Circuit Court's decision, has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power..." in fidelity to the Seventh Amendment of the United States Constitution. Sup. Ct. R. 10(a).

C. Petitioner Did Not Invite Error, and Has Argued Consistently Below and in the Petition

Respondent next erroneously argues that Petitioner invited error by moving for summary judgment, and by acknowledging that Iowa deemed the issue to be one "of law." (Opp. 11-12). Respondent simply mischaracterizes Rule 56, and ignores the basic issue that a jury must still try facts underlying "issues of law."

A Rule 56 motion for summary judgment is not a waiver of its right to a jury trial if the motion is denied. A movant can only proffer undisputed facts in support of the Rule 56 motion[1], and a rejection of that motion, because the facts are disputed or because the undisputed facts by themselves are insufficient, is not a basis for a judgment as a matter of law for the non-movant. If the lower courts viewed a summary judgment motion as a license to *sua sponte* decide disputed facts to render summary judgment in favor of the non-moving party, the courts had plainly added misinterpretation of Rule 56 to the denial of Petitioner's Seventh Amendment rights. Nothing in Rule 56 permits federal courts to decide disputed facts.

Respondent's arguments are deceptive also because Petitioner had consistently argued below that the reasonableness of the liquidated damages clause should go to the jury if summary judgment in its favor was denied.

Respondent's argument that the lower courts could consider summary judgment against Petitioner simply because

---

[1] Summary judgment is permitted only if movant can "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c).

Petitioner had an opportunity to present some facts is plainly wrong. Rule 56 does not permit federal courts to enter summary judgment without notice. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (federal courts "possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence."). That notice is required precisely to afford the moving party an opportunity to marshal evidence showing disputed facts to block summary judgment in the adversary's favour. Respondent's argument disregard these fundamental points in arguing that Petitioner's motion constituted a waiver of its Seventh Amendment right.

Finally, Respondent misstates the law in arguing that Petitioner is inconsistent in having argued that enforceability of liquidated damage clauses is an "issue of law," while arguing that fact issues must still be tried to a jury. Respondent's argument asserts an inconsistency where none exists. Respondent's argument erroneously assumes that any factual disputes underlying an issue "of law" must be determined by the court. That is wrong, because "issues of law" have to be tried to a jury if there are any disputed facts. That is the holding in *Byrd* and many other cases of this Court. (Pet. 18-20).

D. Petitioner Preserved Error

Respondent again mischaracterizes the Petition in arguing that Petitioner did not preserve error. The district court entered summary judgment based on only one recited fact – that Petitioner had signed the Agreement. (Pet. 5). Although *sua sponte*, the fact that Petitioner signed the Agreement found by the district court was not disputed, and Petitioner appealed the summary judgment based on that one undisputed fact.

Respondent alleges that the trial court actually considered all the facts, but never explains how the lower court could have done so when Respondent never filed a motion for summary judgment and the trial court never noticed an intention to consider entering summary judgment against Petitioner.

However, even if Respondent were correct about the basis of the district court ruling, the Circuit Court admittedly engaged in *de novo* fact finding on appeal. (Pet. 9-10). It did so without any notice to Petitioner and resolved disputed facts. That fact-finding on a disputed record by the Circuit Court is the crux of the error below. Petitioner timely raised the issue by motion for reconsideration, which the Circuit Court denied without opinion. Petitioner preserved its right to demand a jury trial of disputed facts at every opportunity.

E. This Case Meets the Standards for Certiorari

Respondent misleadingly dismisses the Petition as nothing more than dissatisfaction with the "erroneous factual findings" by the courts below. (Opp. 17). Petitioner seeks certiorari, however, not because those finding were erroneous, but because the Circuit Court made factual findings at all, which is the Constitutional issue regardless of whether they were correct.

If anything, Respondent's arguments fortify the need for review. Respondent correctly stresses that liquidated damage clauses are an important feature of commercial law. Respondent also cites decisions of other circuit courts that ostensibly support the denial of jury trial of any disputed fact issues relating to the reasonableness of the clauses. These are not reasons to deny review. If Respondent is correct, its arguments only emphasize the need to review an important

Constitutional issue of whether the lower courts are improperly withholding jury trials on an issue that is an important part of this country's commercial landscape.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

George Pazuniak
Counsel of Record
Francis DiGiovanni
Connolly Bove Lodge & Hutz LLP
1007 North Orange Street
Wilmington, Delaware 19801
(302) 658-9141

Attorneys for Petitioner